

Internal distribution code:

- (A) [] Publication in OJ
(B) [] To Chairmen and Members
(C) [] To Chairmen
(D) [X] No distribution

D E C I S I O N
of 19 March 2003

Case Number: T 0195/02 - 3.2.4

Application Number: 95926028.2

Publication Number: 0772389

IPC: A01J 5/017

Language of the proceedings: EN

Title of invention:

Device and method for automatically milking of animals

Patentee:

PROLION B.V.

Opponent:

Maasland N.V.

Headword:

-

Relevant legal provisions:

EPC Art. 84, 123(2),(3)

Keyword:

"Main request - added subject-matter (no)"

Decisions cited:

T 0288/89

Catchword:

-



Case Number: T 0195/02 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 19 March 2003

Appellant: Maasland N.V.
(Opponent) Weverskade 10
NL-3155 PD Maasland (NL)

Representative: Corten, Maurice Jean F.M.
Octrooibureau Van der Lely N.V.
Weverskade 10
NL-3155 PD Maasland (NL)

Respondent: PROLION B.V.
(Proprietor of the patent) Kromme Spieringweg 289B
NL-2141 BS Vijfhuizen (NL)

Representative: Hoorweg, Petrus Nicolaas
Arnold & Siedsma
Advocaten en Octrooigemachtigden
Sweelinckplein 1
NL-2517 GK Den Haag (NL)

Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 24 January
2002 concerning maintenance of European patent
No. 0 772 389 in amended form.

Composition of the Board:

Chairman: C. A. J. Andries
Members: C. D. A. Scheibling
C. Holtz

Summary of Facts and Submissions

I. By its interlocutory decision dated 24 January 2002 the Opposition Division maintained the patent in an amended form. On 6 February 2002 the appellant (opponent) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 30 May 2002.

II. The patent was opposed on the grounds based on Articles 100(a) (54 and 56) and 100(c) EPC. During the appeal proceedings the appellant only referred to the ground of Appeal based on Article 123(2) EPC as well as on Article 84 EPC.

III. Oral proceedings took place on 19 March 2003.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patentee) requested that the appeal be dismissed, or that the patent be maintained on the basis of the first or third auxiliary request filed with letter of 17 February 2003. The second auxiliary request filed with the same letter was withdrawn during the oral proceedings.

IV. Independent claim 1 of the main request (as maintained during opposition) reads as follows:

"1. Device for automatic milking of animals, comprising inter alia one or more milking stalls (5',5'') provided with an entrance gate (21) and an exit gate (22), a lying and walking area (1), a feeding and watering area (3), and an access sluice (6) which is provided with a

first identification system (11) which is coupled to a control system (25) for controlling the device, which access sluice (6) can alternately clear a passage for an animal from the walking area (1) to a milking stall (5',5'') or to the feeding and watering space (3), **characterized in that** a waiting area (2) is incorporated between the access sluice (6) and the entrance gate (21), said waiting area being suitable for harbouring cows before entering the milking stall(s) (5', 5'') and having a size such that the wait-time for the cows can amount to a maximum of one hour".

Independent claim 4 of the main request (as maintained during opposition) reads:

"4. Method for automatic milking of animals which under influence of a control system (25) are guided via an access sluice (6) and a waiting area to one of the milking stalls (5',5'') provided with an automatic milking device, wherein the animals are identified as milkripe animals by a first identification system (11) placed in the access sluice (6), the animals are identified before leaving the milking stall (5',5'') by a second identification system and the milking data is recorded in the control system (25), **characterized in that** after successful milking the animals are guided to a feeding and watering area (3) and in the access sluice (6) the animals are guided to the feeding and watering area (3) when a preset number of animals occupying the waiting area (2) would be exceeded".

Reasons for the Decision

1. The appeal is admissible.

2. *Interpretation of the independent claims:*

2.1 "Harbouring"

According to the definition given in the Webster's Revised Unabridged Dictionary (1913) (available for consultation on the Internet site www.dict.org), "to harbour" means: to afford lodging to; to enter as guest; to receive; to give a refuge to.

Therefore, in the view of the Board and in the context of the patent "harbouring" clearly means "to give a refuge to" in the sense that the cows may dwell in this area before entering the milking stalls (see also section 3.2, below).

This interpretation has been confirmed by the respondent during the oral proceedings as being the sole intended one.

2.2 "Successful milking"

The Board considers that it is part of the basic knowledge of a person skilled in the art in the technical field of automatic milking of animals that "successful milking" means that the milking operation could be carried out as normally to be expected without any problem. This view is confirmed by claim 6 as granted where an unsuccessful milking is implied to occur when "connection of the automatic milking device has not resulted in the expected supply of milk".

The Board therefore cannot understand the lack of

clarity argument (Article 84 EPC) brought forward in this respect by the appellant. Furthermore, the expression "successful milking" was already present in claim 7 as granted, so that a clarity-objection in this respect could have been neglected by the Board.

3. *Claim 1 of the main request - Compliance with Article 123(2) EPC*

3.1 Claim 1 as maintained by the Opposition Division differs from Claim 1 as granted by the addition of the following passage "said waiting area being suitable for harbouring cows before entering the milking stall(s) (5', 5'') and having a size such that the wait-time for the cows can amount to a maximum of one hour".

3.2 The appellant objected to the use of the expression "said waiting area being suitable for harbouring cows" which in his opinion "implies that the waiting area provides a sort of cover for the animals".

However, according to the interpretation made by the Board (see section 2.1, above), "harbouring cows" has to be understood as meaning "to offer a refuge to the cows" and does not imply any sort of cover or any other special requirement to the area where "harbouring" takes place. Therefore, the use of the expression "said waiting area being suitable for harbouring cows" does not contravene the provisions of Article 123(2) EPC.

3.3 The appellant also objected that the feature "having a size such that the wait-time for the cows can amount to a maximum of one hour" has been extracted from the description of an embodiment in isolation of the rest of the disclosure relating to said embodiment. The

appellant argued that in order to be sure that cows do not have to wait for more than one hour, once the waiting area is full, it has first to be totally cleared before any further animals could be admitted again. This requirement however would imply that expelling means are implicitly needed to clear the waiting area and therefore expelling means should have been mentioned in the claim.

3.4 The respondent argued that the term "waiting area" has already been defined in claim 1 of WO-A-96/03031 and that there was no indication in the disclosure for the need of expelling means in the waiting area. In the respondent's view, claim 1 does not require that all cows present in the waiting area are effectively milked within one hour. Claim 1 only requires that the size of the waiting area is sufficient to receive the number of animals that could be milked within one hour.

3.5 The Board too considers that claim 1 only defines how to calculate the required size of the waiting area, but does not set an effective duration within which the animals have to be milked. Thus, there are no implicit features to be considered in addition to those cited in the following passage of the description (WO-A-96/03031, page 3, lines 7 to 11) which reads as follows: "The size of waiting area 2 depends on the capacity of milking parlour 5 and the number of animals in the herd. It is conceivable that the waiting area 2 takes such a large form that the wait-time for the cows in waiting area 2 can amount to a maximum of one hour".

3.6 The Board notes that according to said passage the size of the waiting area is brought into relation with two parameters namely the capacity of the milking parlour

and the number of animals in the herd.

The feature introduced in the claim relates solely to the maximum wait-time. It is however clear for a skilled person that in principle solely the capacity of the milking parlour determines the number of cows which can be milked on an average in a one hour period and thus determines the size that the waiting area must have to accommodate the number of cows that can be milked within a maximum wait-time of one our. Consequently, since it is clear that the wait-time and the capacity of the milking parlour are linked to each other, defining the size of the waiting area with respect to the wait-time amounts to define it implicitly with respect to the capacity of the milking parlour.

- 3.7 In the passage of the description cited above (section 3.5), the size of the waiting area is also said to be related to the number of animals in the herd.

The appellant argued in this respect that, since the number of animals that can be milked in one hour depends on the number of milking stalls and since it is obvious that the number of milking stalls has to be determined with respect to the size of the herd, the number of animals which can be milked within one hour depends also on the size of the herd. Therefore, the size of the waiting area (which is sized to receive the number of animals which can be milked within one hour) depends also on the number of animals in the herd.

Consequently, claim 1 should at least have included all the features of the above cited passage of the description, i.e. that the size of waiting area depends

on the capacity of milking parlour and the number of animals in the herd.

- 3.8 The Board considers that it is correct to assume that the capacity of the milking parlour (i.e. the number of milking stalls needed for the device in order to operate properly) has to be determined in function of the number of animals of the herd. However, once the device and the number of milking stalls is determined, the size of the waiting area is solely to be calculated with respect to the number of animals that can be milked within one hour (i.e. with respect to the capacity of the milking parlour). As a matter of fact, even if, for a given device, the number of animals of the herd would come to change, this would have no influence on the number of animals which can be milked within one hour and thus, no influence on the size of the waiting area.

Therefore, the Board comes to the conclusion that the size of the waiting area is not related to the number of animals in the herd and that therefore, it was not necessary to introduce this originally disclosed parameter into claim 1.

- 3.9 Thus, the Board concludes that the amendments made (see section 3.1, above) do not contravene the requirements of Article 123(2) EPC.

4. *Claim 4 of the main request - Compliance with Article 123(2) EPC*

- 4.1 Claim 4 as maintained by the Opposition Division differs from Claim 4 as granted by the addition of the expression "and a waiting area" (between "... animals

... are guided via an access sluice (6)" and "to one of the milking stalls ...") and of the following passage "after successful milking the animals are guided to a feeding and watering area (3) and in the access sluice (6) the animals are guided to the feeding and watering area (3) when a preset number of animals occupying the waiting area (2) would be exceeded".

- 4.2 That a "waiting area" is incorporated between the access sluice and the entrance gate of the milking stalls is already disclosed in claim 1 as published (WO-A-96/03031) and thus, does not contravene the requirements of Article 123(2) EPC.
- 4.3 Although the passage "after successful milking ... exceeded" listed above in section 4.1 is disclosed in claim 7 as published (WO-A-96/03031) as well as in claim 7 as granted, in the view of the appellant, said features cannot be claimed independently of the features of claim 5 of WO-A-96/03031, since claim 7 of WO-A-96/03031 refers back to either of the claims 5 and 6 of WO-A-96/03031 (which in turn refer back to claim 4 of WO-A-96/03031). The appellant argued that without the definition of an "unsuccessful milking" given in claim 5, a skilled person would not know how the expression "successful milking" should be interpreted.
- 4.4 The Board cannot accept the appellant's arguments. As indicated in section 2.2 above, the Board considers that the meaning of "successful milking" is basic knowledge for a skilled person in the technical field of automatic milking.

The Board considers also that it is correct that a dependency cannot be removed if doubt exists as to

whether the claims of a patent are only to be understood in the restricted fashion resulting from the dependency. However, the removal of a dependency and the introduction into an independent claim of features from a dependent claim, regardless of other features or other dependent claims, is not prohibited as long as the skilled person recognises that there is clearly no close functional or structural relationship between the one dependent claim (here Claim 7 of WO-A-96/03031) and the other features or other dependent claims (here Claims 5, 6 of WO-A-96/03031) (see also decision T 288/89, section 2.2).

- 4.5 In the present case, claim 7 of WO-A-96/03031 refers to the case where automatic milking was successful, whereas claims 5 and 6 of WO-A-96/03031 refer to cases where automatic milking has failed. Therefore, the feature "after successful milking the animals are guided to a feeding and watering area (3)" does not have any close functional or structural relationship with the features of claims 5 and 6 relating to how to proceed in case milking has failed.

The method steps involved in guiding the cows when leaving the milking stall (claims 5 to 7 of WO-A-96/03031) have to be considered as alternatives, which due to the different situations which trigger this further guiding of cows and which furthermore have no interference with each other, are completely independent from each other.

Consequently, the introduction of said feature into independent claim 4 does not contravene the requirements of Article 123(2) EPC.

4.6 Furthermore, the feature of claim 7 of WO-A-96/03031, according to which "in the access sluice (6) the animals are guided to the feeding and watering area (3) when a preset number of animals occupying the waiting area (2) would be exceeded" is not related to the carrying out of the automatic milking operation at all, nor to the guidance of cows when leaving the stalls, but solely to the number of animals occupying the waiting area when a cow is in the access sluice. Therefore, it is clear for a skilled person that there is no close functional or structural relationship between said feature of claim 7 of WO-A-96/03031 and the features of claims 5 and 6 of WO-A-96/03031. Consequently, the introduction of said feature in independent claim 4 does not contravene the requirements of Article 123(2) EPC either.

Moreover, said feature "in the access sluice (6) the animals are guided ... exceeded" is not only disclosed in claim 7 but also in the description of WO-A-96/03031 page 5, lines 28 to 30 and 33 to 36. From this passages too it is clear that said feature is independent from the outcome of milking and the resulting guidance of the cows when leaving the stalls, since said passages refer to how to handle animals which have not been in the stalls yet when the waiting area is full of cows.

4.7 Thus, the introduction of the features of claim 7 as granted into claim 4 as granted without also introducing the features of claim 5 as granted does not contravene the requirements of Article 123(2) EPC.

4.8 Thus, the Board comes to the conclusion that the subject-matter of claim 4 as maintained by the Opposition Division does not contravene the

requirements of Article 123(2) EPC.

5. *Compliance of claims 1 and 4 of the main request with the requirements of Article 123(3) EPC*

Both independent claims 1 and 4 of the main request comprise additional features which further limit the scope of protection when compared with the corresponding claims as granted. Thus, the requirements of Article 123(3) EPC are met.

6. *Conclusions*

6.1 Thus, the Board comes to the conclusion that the grounds of appeal relied upon by the appellant do not prejudice the maintenance of the patent as maintained by the Opposition Division.

6.2 Since the Board accedes to the respondent's main request there is no need to examine its auxiliary requests.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries